February 14, 2023

Mr. Himamauli Das
Acting Director
Financial Crimes Enforcement Network
U.S. Department of the Treasury
P.O. Box 39
Vienna, VA 22183

Submitted electronically via http://www.regulations.gov

RE: Beneficial Ownership Information Access and Safeguards, and Use of FinCEN Identifiers for Entities

Docket No.: FINCEN-2021-0005 and RIN 1506-AB49/AB59

Dear Acting Director Das:

This letter responds to the request by the Financial Crimes Enforcement Network (FinCEN) of the United States (U.S.) Department of the Treasury (Treasury) for comment on a notice of proposed rulemaking (NPRM) regarding access by authorized recipients to beneficial ownership information (BOI) that will be reported pursuant to section 6403 of the Corporate Transparency Act (CTA).[1]

The FACT Coalition is a non-partisan alliance of more than 100 state, national, and international organizations promoting policies to build a fair and transparent global tax system that limits abusive tax avoidance and to curb the harmful impacts of corrupt financial practices.[2] The FACT Coalition has drafted this comment in collaboration with its members Global Financial Integrity (GFI), the Anti-Corruption Data Collective (ACDC), and the Project on Government Oversight (POGO).[3]

[1] Financial Crimes Enforcement Network (FinCEN), "Beneficial Ownership Information Access and Safeguards, and Use of FinCEN Identifiers for Entities," Federal Register, 87 FR 77404 (Docket Number: FINCEN-2021-0005, RIN: 1506-AB49/AB59), Dec. 16, 2022, https://www.federalregister.gov/documents/2022/12/16/2022-27031/beneficial-ownership-information-access-and-safeguards-and-use-of-fincen-identifiers-for-entities [hereinafter, the "Proposed Access Rule"].
[2] A full list of FACT members is available at: Financial Accountability and Corporate Transparency (FACT) Coalition, "Coalition Members," 2023, https://thefactcoalition.org/about-us/coalition-members-and-supporters/.
[3] For more information on Global Financial Integrity, a DC-based think tank focused on illicit financial flows, see https://gfintegrity.org/about/. For information on the Anti-Corruption Data Collective, a network of journalists, data analysts, academics, and policy advocates working to expose transnational corruption flows, see https://acdatacollective.org/about/. You may learn about Project on Government Oversight, a nonpartisan independent watchdog that investigates and exposes waste, corruption, abuse of power, at this link: https://www.pogo.org/about.

The FACT Coalition welcomes efforts by FinCEN to implement the CTA, which was enacted to significantly increase beneficial ownership transparency for a wide range of entities operating in the United States. Following adoption of the first final rule implementing the CTA in September 2022 – which provided clarification regarding the definition of reporting companies; the information that should be reported to FinCEN with respect to which beneficial owners; timing regarding reporting requirements; penalties for failing to report; and other key details – FinCEN is well positioned to require beneficial ownership reporting beginning January 1, 2024 under the CTA for certain entities. Just as critically important as the information collected under the CTA is the means by which the information may be accessed by authorized users, which is the subject of this second rulemaking.

While the proposed rule hews closely to the statute in certain regards, the final rule must incorporate clarifying measures described in the remainder of this comment letter to faithfully implement the CTA. The most important of the suggested improvements would do the following:

1. **Remove problematic impediments to State, local and Tribal authority access.** To faithfully implement the CTA, FinCEN should promulgate a final rule that does not inappropriately impede State, local, or Tribal law enforcement access to the BOI directory. Among other required changes, the final rule should not narrow the concepts of "court authorization" or the 'officers of the court" that may grant court authorization permitting access to the BOI directory.
2. **Clarify the respective role of FinCEN and other statutory actors under the CTA in determining access to the beneficial ownership directory**. To the extent that FinCEN has proposed a role for itself in granting or reviewing access to the BOI directory that is inconsistent with the statutory language and administrative practicalities underlying the CTA's intent, FinCEN should reverse course in the final rule to faithfully implement the law.
3. **Directly address the statutory requirement under the CTA that FinCEN ensure that information in the directory is verified.**[4] To faithfully implement the CTA, FinCEN must promulgate a final rule and implement the BOI directory in a way that promotes data best practices. This includes: (i) ensuring those submitting information are identified and authorized to do so; (ii) ensuring the information submitted is validated; (iii) ensuring the BOI itself is verified to be true, as required by the Financial Action Task Force (FATF); and (iv) ensuring data that has already been submitted is maintained as accurate.
4. **Clarify that access to the directory is also readily available to those agencies required to audit the directory under the CTA.** To faithfully implement the CTA, the final rule must specifically address and grant ready, complete access to those federal agencies that are to audit CTA implementation or perform specified studies regarding CTA implementation, for the purposes laid out in the statute. Most specifically, this

[4] For more detailed comments on required data best practices under the CTA, FACT directs Treasury to the comment submitted by Open Ownership. Specifically, Open Ownership provides detailed analysis under the CTA relating to (i) verification of data, including BOI; (ii) organizing BOI as structured and interoperable data using internationally recognized data standards; and (iii) authorized user processes around data access that will ensure the directory is highly useful to authorized directory users as required under the CTA.

includes the Treasury Inspector General and the Comptroller General of the United States within the Government Accountability Office.

5. **Clarify that financial institution access to the directory conforms with CTA intent and is consistent with broader AML and sanction screening requirements.** To faithfully implement the CTA, the final rule should make clear that financial institution access is to be allowed pursuant to all customer due diligence requirements consistent with the intent of the statute, and further that BOI information accessed by financial institutions is to be incorporated into the maintenance of effective AML/CFT, anti-fraud and sanctions screening programs, consistent with applicable law.
6. **Provide clarification regarding certain components of foreign access to the directory that are inconsistent with the plain text of the CTA.** To faithfully implement the CTA, the final rule should remove certain additional restrictions on foreign partners accessing the BOI directory that have no basis under the CTA.
7. **Clarify that certain applicable security and confidentiality requirements applying to authorized users do not need to be verified or addressed anew in connection with each request for information.** To faithfully implement the CTA, the final rule should clarify that certain access protocols, such as agency agreements with FinCEN governing access to the BOI directory, are meant to be maintained to govern access generally and not separately with respect to each request.
8. **Clarify the potential scope of disclosure associated with authorized disclosure in the case of civil and criminal proceedings involving Federal, State, local and Tribal laws.** The proposed rule contemplates the authorized redisclosure of information in connection with civil and criminal proceedings involving Federal, State, local, and Tribal laws to a court of competent jurisdiction or parties to the proceeding. To faithfully implement the CTA, the final rule should clarify that procedurally related disclosure is not subject to additional review (e.g., as a result of a public court decision, among other reasons).

This comment also commends, and provides additional support for, FinCEN in providing guidance that clarifies the best reasonable interpretation of the CTA relating to (i) a statutorily-guided interpretation of the phrase “national security, intelligence, or law enforcement activities,” subject to certain recommended clarifications; (ii) the clarification that “existing databases and related IT infrastructure” may satisfy the requirement to ‘establish and maintain’ secure systems in which to store BOI where those systems have appropriate security and confidentiality protocols, subject recommended clarifications; (iii) the incidence of reporting company approval for access to the directory for authorized financial institutions and related record-keeping requirements, subject to certain clarifications; (iv) clarifications regarding appropriate redisclosure of BOI under the CTA, subject to certain clarifications; (v) making clear that Treasury has ready, uncomplicated access to the directory per the plain language of the CTA; and (vi) the appropriate limitation of the use of FinCEN intermediary identifiers based on the plain language of the statute meant to avoid ambiguous or potentially misleading reporting of BOI. Where applicable, this comment identifies whether those specific inquiries flagged by FinCEN are addressed by the applicable priority.

Finally, this comment letter urges that Treasury expediently withdraw and reissue the proposed BOI intake forms released by FinCEN on January 17, 2023.[5] While FACT will separately submit comments on the proposed intake form by March 20, 2023 in line with the public solicitation for such comments, FACT urges Treasury to reverse course on the unprecedented reporting optionality FinCEN proposes offering under the CTA.

The Proposed BOI Intake Form allows reporting companies to report "unknown" with respect to each relevant detail regarding a given beneficial owner's identity–including whether the company is even able to identify its beneficial owners in the first place.[6] **Allowing reporting companies to simply declare that they do not know information required under the CTA has no basis in the law and conflicts with the CTA's plain meaning.** It is not an exaggeration to say that the Proposed BOI Intake Form effectively makes the CTA an optional reporting regime. Congress did not give FinCEN the authority to declare the CTA as an optional law. That is an absurd result that FinCEN must avoid in promulgating any final BOI intake form.[7]

The Proposed BOI Intake Form is also inconsistent with a wide variety of other federal third-party information reporting and similar regimes regarding AML/CFT programs, securities regulation, tax enforcement, employment eligibility regulation and more. Failing to require this information would undercut the purpose of the law and federal third-party information reporting and similar regimes, generally. In the interest of time, FACT urges the Treasury to withdraw the proposed BOI intake forms and expediently reissue them without the option to declare as "unknown" required identifying information regarding beneficial owners and applicants under the CTA.

[5] Financial Crimes Enforcement Network (FinCEN), "Agency Information Collection Activities; Proposed Collection; Comment Request; Beneficial Ownership Information Reports," Federal Register, 88 FR 2760 (Docket Number: FINCEN-2023-0002, RIN: 1506-0076), Jan. 17, 2023, https://www.federalregister.gov/documents/2022/12/16/2022-27031/beneficial-ownership-information-access-and-safeguards-and-use-of-fincen-identifiers-for-entities [hereinafter, the "Proposed Access Rule"].

[6] See id. The Proposed BOI Intake Form also allows a similar level of voluntary reporting regarding applicants in a way that has no tie to the final first rule implementing the CTA and that also has no basis under the CTA. See id.

[7] See, e.g., Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 575 (1982) ("interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available"); Public Citizen v. Young, 831 F.2d 1108, 1112 (D.C. Cir. 1987) ("a court must look beyond the words to the purpose of the act where its literal terms lead to absurd or futile results" (cleaned up)).

I. Remove Problematic Impediments to State, Local and Tribal Authority Impediments Access (Question 1, Question 7)

The CTA clearly and precisely permits the disclosure of beneficial ownership information upon receipt of a request through appropriate protocols from a State, local, or Tribal law enforcement agency "if a court of competent jurisdiction, including any officer of such a court, has authorized the law enforcement agency to seek the information in a criminal or civil investigation."[8] Effective implementation of the CTA requires that FinCEN not unnecessarily complicate or obstruct this access by limiting the scope of the following three key concepts: (i) court of competent jurisdiction; (ii) officer of a court; and (ii) authorization by a court, including any officer of such a court.

FinCEN correctly does not narrow the concept of a court of competent jurisdiction in the proposed rule; however, the proposed rule does implicitly restrict the second and third concept by requiring a "court order." FinCEN also adds an entirely new burden to the concept of court authorization, requiring that such authorization be "uploaded," which is not otherwise contemplated by the CTA. FinCEN should reverse course on these proposed impediments as they are inconsistent with plain language of the statute and conflict with the statutory purpose that the directory be "highly useful" to authorized users.

A. "Court of Competent Jurisdiction"

Proposed 31 CFR 1010.955(b)(2) clarifies that "a court of competent jurisdiction" is "any court with jurisdiction over the criminal or civil investigation for which a State, local, or Tribal law enforcement agency requests information… ."[9] FinCEN was correct to identify that "court of competent jurisdiction" is an irreducible phrase under the CTA, and this is the best read of the statute. Narrowing this phrase would potentially limit the scope of access to BOI in a way that is inconsistent with the CTA, including as it may relate to the different construction of various State, local, or Tribal justice systems.

B. The "Court Order" Requirement Conflicts with the Plain Meaning of the CTA

In detailing the procedures pursuant to which a State, local, or Tribal agency may request access to the directory, FinCEN has, among other items discussed in more detail below, required a "copy of a court order from a court of competent jurisdiction authorizing the agency to seek the information in a criminal or civil investigation."[10] This language explicitly requires a "court order"–a requirement that significantly narrows the statutory language regarding access to the directory, requiring "court authorization" from "any officer of such a

[8] 31 U.S.C. § 5336(c)(2)(B)(i)(II).
[9] Proposed Access Rule supra note 1, 31 CFR § 1010.955(b)(2).
[10] Proposed Access Rule supra note 1, 31 CFR § 1010.955(d)(1)(ii)(B)(2)(i).

court." This restriction is inconsistent with the CTA's plain language and statutory intent and this requirement must be clarified in the final rule.

The best read of the CTA is that FinCEN should not narrow the concepts of "court authorization" or "officer of a court," as different jurisdictions may have different procedures and related rules for a variety of reasons as FinCEN acknowledges in the preamble to the proposed rule. Additional guidance should be issued, however, to clarify that authorization relating to grand jury proceedings does satisfy the CTA access requirement for State, local, and Tribal authorities.

1. A Final Rule Should Not Narrow the Concepts of Court Authorization and "Any" Officer of the Court

FACT recommends that FinCEN promulgate a final rule that does not inappropriately narrow the concept of court authorization issued by *any* officer of the court. It is clear from the plain language and legislative history of the CTA that Congress specifically chose not to require a court order issued by a judge in connection with granting State, local and Tribal access to the directory.

The "court order" requirement in the proposed rule is particularly odd in light of the fact that the preamble to the proposed rule states that "FinCEN has not sought to define what it means for a court to 'authorize' the law enforcement agency to seek BOI, but aims to ensure that BOI access at the State, local, and Tribal level is highly useful to law enforcement and has consistent application across jurisdictions."[11] FinCEN instead seems to indicate in the preamble that a court order is merely an example of when it is always the case that court authorization exists.[12] So, it is unclear whether the intent by FinCEN was to, in fact, require a court order at all; however, that is the probable effect of the proposed rule and FinCEN should clarify it did not mean to inappropriately limit State, local and Tribal access.

Requiring a "court order' limits both the nature of a court authorization and the category of officers of a court that may grant access to the CTA directory. This is in conflict with the plain meaning of the CTA. First, as FinCEN acknowledges, there are many forms of court authorization.[13] If Congress had meant to limit access to a "court order", they would have explicitly done so.[14] Concerningly, court order might be read to further imply that authorization must come from a judge. However, the statute clearly considers authorization from "*any*" authorized officer of the court.[15] Again, Congress would have said "judge" if it meant as much; it did not. To regulate otherwise ignores the ordinary meaning of the statute and more specifically

[11] See Proposed Access Rule supra note 1 at 77413.
[12] See id. ("At a minimum, the proposed rule would allow a State, local, or Tribal law enforcement agency (including a prosecutor) to access BOI where a court specifically authorizes access in the context of a criminal or civil proceeding, for example, through a court's issuance of an order or approval of a subpoena.").
[13] See id.
[14] See, e.g., Congressional Research Service, Statutory Interpretation: Theories, Tools, and Trends, 22-25 (updated May 2022), https://crsreports.congress.gov/product/pdf/R/R45153 ("Courts often begin by looking for the "ordinary" or "plain" meaning of the statutory text.").
[15] 31 U.S.C. § 5336(c)(2)(B)(i)(II).

ignores the use of the word "any," which conveys that a variety of *different* types of officers of a court are able to authorize access.[16]

It is also clear from the legislative history of the CTA that Congress specifically chose not to require a court order issued by a judge in connection with granting State, local and Tribal access to the directory. One of the principal architects of the law, Senator Sherrod Brown, said the following in connection with CTA's passage:

> "For State, local or tribal law enforcement, they must get approval by a tribal, local, or state court of competent jurisdiction, which need not be a judge--it can include an officer of the court like a magistrate, court clerk or other administrative officer.
>
> While I saw no reason to treat federal, state and local law enforcement officials differently, my Republican colleagues insisted on this differential treatment, and I am hopeful that the flexibility we have built in should make it workable.
>
> It is far more workable than the scheme some had pushed, to require approval by a federal judge each time law enforcement wanted to access the database--an approach which would have gutted the bill, tied up our federal courts, and effectively rendered it inaccessible to state and local law enforcement. But the key here is a robust, functional and effective database at FinCEN to house this information and make it readily available.
>
> …
>
> FinCEN should ensure that federal, state, local, and tribal law enforcement can access the beneficial ownership database without excessive delays or red tape…."[17]

As these statements demonstrate, Congress specifically negotiated on a bipartisan basis to create a different State, local and Tribal access protocol for purposes of the CTA; however, this protocol explicitly did not require a "court order," and the authorization contemplated could be issued by a broad range of officers of the court. To regulate otherwise would be to create excessive red tape in accessing the directory that Congress sought to avoid.[18] In promulgating the final rule, FinCEN should reverse course on requiring a court order in connection with access by State, local, and Tribal authorities.

Instead, FinCEN should avoid limiting language that might restrict access to the CTA directory. To the extent that State, local, and Tribal governments may design court systems in different manners, FinCEN's final rule should maintain flexibility contemplated by the CTA to ensure that access protocols to the directory create a "robust, functional and effective database

[16] See CRS supra note 14 at 31 ("The surplusage canon requires courts to give each word and clause of a statute operative effect, if possible.").
[17] Senator Sherrod Brown, "National Defense Authorization Act," Congressional Record 166: 208 (December 9, 2020), https://www.congress.gov/116/crec/2020/12/09/CREC-2020-12-09-pt1-PgS7296.pdf, pp. S7310-11.
[18] See id.

at FinCEN to house [BOI] information and make it readily available."[19] This may be achieved by leaving as irreducible the concepts of court authorization and the definition of appropriate officers of the court.

2. A Final Rule should provide Additional Clarification Regarding Grand Juries and other Examples Court Authorizations

While maintaining as irreducible the concepts of court authorization and the definition of appropriate officers of the court, FinCEN might consider clarifying examples of when court authorization does exist. For example, FinCEN should make clear that grand jury proceedings and other powers of subpoena granted in the various States, localities and tribal jurisdictions do authorize access to the CTA's directory.

FinCEN states in the preamble to the proposed rulemaking that it is seeking more information regarding the incidence of "court authorization" in the case of grand jury proceedings, including those that allow prosecutors to sign grand jury proceedings in certain states.[20] FinCEN's concern may, in part, be understood to stem from its earlier conclusion that "FinCEN does not believe that individual attorneys acting alone would fall within the definition of 'court officer' for purposes of this provision."[21] However, this position ignores the individual determination by States, localities, and Tribal court systems that certain individual attorneys or other identified actors, like certain law enforcement actors, with specific duties and responsibilities, are actually empowered by the state to issue subpoenas or otherwise give court authorization.

There is no basis in the statute for FinCEN to limit the ability of States, localities and Tribal court systems to name officers of the court who may inherently give court authorization by exercising subpoena or similar power. FinCEN's analysis is also problematic in that it confuses who is an officer of a court with the officers of a court that may grant court authorization. FinCEN should clarify in promulgating the final rule that grand jury proceedings and other powers of subpoena are among the qualifying types of court authorizations granted by different qualifying officers of the court, without otherwise limiting the meaning of the phrase "court authorization" or the actors who may qualify as "officers of the court."

3. Requiring Identified Documents to be "Uploaded" to Obtain Directory Access Has no Basis in the CTA

In promulgating the final rule, FinCEN should also remove the proposed requirements that FinCEN upload a copy of any court authorization and provide a "written justification" setting forth specific reasons why the requested information is relevant to a State, local or Tribal criminal or civil investigation. Although FinCEN does have some discretion regarding the implementation of additional safeguards necessary or appropriate to protect the confidentiality

[19] See id.
[20] See Proposed Access Rule supra note 1 at 77413-4. FinCEN also cites additional processes pursuant to which subpoenas may be issued without even involving the grand jury process. See id. at n.99.
[21] Id. At 77414.

of BOI, the nature of these proposed requirements is inconsistent with the plain language of the CTA and the nature of the protocols created by Congress.

The CTA sets forth specific access protocols for identified classes of authorized users. Among other factors, these protocols focus on internal record-keeping processes that can aid auditability and information storage systems requirements.[22] As will be discussed further below, these protocols and internal record-keeping requirements are meant to serve two essential goals in the CTA: (i) to ensure BOI information is secure and properly used; and (ii) to create an effective directory that is readily accessible so long as identified protocols are followed. While these protocols allow FinCEN to audit access to the directory, it is clear from the various protocols that Congress explicitly did not mean to give unfettered discretion to FinCEN in connection with granting access to the directory.[23] This is essential to a functioning directory.

In this context, the proposed rule's request for a written justification for access to the directory for State, local and Tribal jurisdictions may not faithfully implement the CTA.[24] No protocol created by Congress for accessing the CTA directory requires a "written justification"--a phrase that seems to imply that FinCEN may have some subject matter review discretion regarding an underlying request. Instead, Congress did require certain certifications in connection with identified authorized users–such as in connection with access by federal agencies engaged in national security, intelligence or law enforcement activities.[25] This language does not appear with respect to State, local, and Tribal government requests, though.

As Congress explicitly required additional certifications with respect to other authorized users, it seems conflicting that Congress would intend for Treasury to create the most heightened review process for State, local, and Tribal agencies, which have no certification obligations under the CTA with respect to the reasons why requested information is relevant to a criminal or civil investigation. Instead, Congress relied on court authorization from any officer of the court to determine when access to the CTA directory is appropriate for State, local, and Tribal agencies. State, local, and Tribal courts have the subject matter expertise to determine when and whether access to the CTA directory is appropriate based on subject civil or criminal matters. Congress recognized this and did not require separate review by FinCEN, and it would be inappropriate for the final rule to incorporate this level of discretionary review for FinCEN.

Additionally, FinCEN has neither the expertise nor the resources to independently review court authorizations or other requests for access from State, local and Tribal authorities, and Congress specifically did not appropriate funds to FinCEN to achieve these aims.[26] However, court authorizations would be included in the internal records that authorized users must keep.[27] FinCEN should remove the obligations for State, local and Tribal authorities to justify their reasons for using the directory and to upload or deliver to FinCEN any form of court authorization in connection with accessing the directory, as there is no basis for these rules in the CTA.

II. Clarify the respective role of FinCEN and other statutory actors under the CTA in determining access to the beneficial ownership directory

[22] 31 U.S.C. § 5336(c)(3).
[23] See id.
[24] See Proposed Access Rule supra note 1 at § 1010.955(d)(1)(ii)(B)(2)(ii).
[25] See id.
[26] See id.
[27] See Proposed Access Rule supra note 1 at § 1010.955(d)(1)(i)(E).

As discussed in the immediately preceding section, the CTA relies on protocols–or, procedural checks–exercised, as appropriate, by identified competent authorities or internally by financial institutions to determine when authorized users may access the CTA's BOI directory. The construction of these procedural checks ensures that the CTA can be implemented effectively, including (i) to not alter subject matter jurisdiction for any authority–including FinCEN–in a way that would complicate or delay access, as applicable, and (ii) to allow for auditable and technologically automated access to the BOI directory. While FinCEN is charged with ensuring that these protocols are followed under the CTA, it is clear that the CTA is not meant to delegate any oversight authority to FinCEN with respect to areas where authorized users are competent or otherwise create unfettered discretion with respect to when authorized users may access the directory.

To the extent that FinCEN has proposed a role for itself in granting or reviewing access to the CTA on a case-by-case basis that is not specifically contemplated by the statute, FinCEN should reverse course in the final rule. Failing to do so may also create administrative hurdles that would undermine the highly useful nature of the directory for its users, in conflict with the intent of the CTA.

A. The Access Protocols are Well-Tailored Based on the Competency of Each Authorized User to Facilitate Access

FinCEN should clarify, consistent with the plain language of the CTA, that it does not intend to provide additional review for the substantive law determinations that must be made in connection with requests for access by identified authorized users or otherwise use its personnel to review and approve access for authorized users on a case-by-case basis.

Pursuant to the CTA, FinCEN "may" grant access to the CTA directory "upon the receipt of a request, through appropriate protocols" from certain authorized users.[28] FinCEN "may" also decline to provide access to the directory or even suspend access to the directory if the requesting agency has failed to meet the protocols identified, the information is being requested for an unlawful purpose, or other good cause exists.[29] Neither of these grants of authority to FinCEN are meant to require case-by-case access approval by FinCEN personnel for authorized user access, including as may involve substantive law determinations, and they are also not meant to create unfettered discretion for FinCEN.[30]

Consider that the protocols set forth by Congress generally rely on steps taken by authorized users internally to determine that the relevant competent authority or regulated party

[28] 31 U.S.C. 5336(c)(2)(B).
[29] 31 U.S.C. 5336(c)(6)-(7). A user may also be suspended for repeated or serious violations. See id.
[30] See id. A contrary argument may be that FinCEN may deny or suspend access if the "information is requested for an unlawful purpose." However, the CTA makes explicit that an "unlawful purpose" for the information relates to the knowing disclosure or knowing use of the BOI in a manner not consistent with the statute itself. 31 U.S.C. 5336(h)(2)).That is, the best read of the statute is that the CTA makes FinCEN a subject matter expert in reviewing whether the information may be requested for the unlawful purposes of improper use or disclosure by the requesting party; the CTA does not give FinCEN review over the legal determinations that an authorized user or other competent authority may exercise within their own jurisdiction in determining whether access is relevant to an applicable investigation.

(in the case of financial institutions) is using the directory in an appropriate manner and maintaining the necessary records to assist in auditing of the user's directory access.[31] For example, Federal agencies engaged in national security, intelligence or law enforcement activities (and functional regulators) are able to request access based on their own determination of whether the information is relevant to furthering such activities.[32] State, local, and Tribal court systems are to authorize access to the directory in connection with State, local, and Tribal criminal or civil investigations.[33] Federal agencies are to make the determination as to whether foreign actors are requesting information pursuant to an applicable international treaty, agreement, convention, or other satisfactory official request.[34] And financial institutions are to make the determination as to whether they are obligated to fulfill customer due diligence requirements.[35]

Absent from these protocols is any indication that FinCEN would be involved in reviewing the substantive law determinations of the authorized users. To clarify that FinCEN will pursue the role specifically created by Congress for the agency in carrying out the CTA, FinCEN should explicitly state that it does not intend to review access determinations on a case-by-case basis prior to authorized users accessing the BOI directory. Additionally, FinCEN should (ii) clarify or remove its addition of references to agency "justifications" in connection with access, and (ii) remove FinCEN's "sole discretion" in describing the authority FinCEN has in determining whether to deny a request for access (or whether it has the ability to bar an agency from directory access).

1. The CTA Requires does not Require "Justification" for Directory Access

FinCEN should promulgate a final rule that does not rely on authorized user "justifications" to FinCEN. Congress only explicitly requires "certification" to Treasury with respect to the specific reason for accessing the directory for federal agencies engaged in national security, intelligence, or law enforcement activities for use in furtherance of such activity.[36] However, there is no indication in the CTA or otherwise that FinCEN should have the authority to independently review whether the determination made by the requesting agency is valid or not. This is, of course, because FinCEN does not have the capacity or subject matter expertise to do so. This is consistent with the idea of allowing authorized users to certify to FinCEN that the applicable agency has made the relevant determination in the first place.

Yet, FinCEN requires State, local, and Tribal authorities under the proposed rule to provide a "written justification that sets forth the specific reasons why the requested information is relevant to the [applicable] criminal or civil investigation."[37] It is important to note the distinction between the word "justification" chosen here by FinCEN, and the use of "certification"

[31] 31 U.S.C. § 5336(c)(3).
[32] 31 U.S.C. § 5336(c)(2)(B)(i)(II).
[33] 31 U.S.C. § 5336(c)(2)(B)(i)(II).
[34] 31 U.S.C. § 5336(c)(2)(B)(i)(III). A similar protocol is in place for federal functional regulators. 31 U.S.C. § 5336(c)(2)(C).
[35] See id.
[36] 31 U.S.C. § 5336(c)(3)(E); § 5336(c)(2)(3).
[37] See Proposed Access Rule supra note 1 at § 1010.955(d)(ii)(B)(2)(ii).

contemplated by Congress in connection with certain authorized users.[38] Unlike a certification, pursuant to which a federal agency–or, in the case of the proposed rule, a financial institution via checkbox[39]–is simply confirming that it has done the review it is competent to perform, the use of "justification" implies some level of persuasiveness must be included.

However, FinCEN has no subject matter expertise in determining whether beneficial ownership information may be relevant to a civil or criminal State, local or Tribal matter. If Congress meant to extend FinCEN's subject matter expertise to State, local or Tribal civil or criminal matters, it would have explicitly done so. Congress did not do so, and FinCEN should remove this obligation or similar references in any final rule.

2. FinCEN should Clarify that it Does not Have Unfettered Discretion in Denying Access to the BOI Directory

Congress did not grant FinCEN ultimate discretion over whether any particular user may access the BOI directory due to substantive legal and practical considerations. Yet, FinCEN may have created additional discretionary authority for itself by adding the phrase "sole discretion" in describing its ability to review and deny individual directory access requests or to suspend access to the directory.[40] This phrase does not exist in the statute. This phrase is also inherently inconsistent with the circumstances when FinCEN may deny or suspend access under the CTA.

For example, FinCEN may deny access for "other good cause."[41] "Other *good* cause"–in contrast to "any" cause–in the law denotes a legal sufficiency that is objectively or reasonably determined. Further, this level of legal sufficiency that is objectively or reasonably determinable must also apply with respect to the two prior opportunities for denial or suspension, as the other good causes. In contrast, the concept of "sole discretion" allows for purely subjective review by FinCEN.

As "sole discretion" was not in the language of the CTA, and the language around good cause was included in the CTA, FinCEN should resolve this potential confusion in the final regulations by removing reference to "sole discretion." FinCEN should further clarify that its role in facilitating BOI directory access, and its ability to deny or suspend access, in each case will not involve FinCEN reviewing or making determinations with respect to subject matters in which FinCEN does not have expertise and which are specifically delegated to (or would otherwise

[38] Compare Proposed Access Rule supra note 1 at § 1010.955(d)(ii)(B)(1), with Proposed Access Rule at supra note 1 at § 1010.955(d)(ii)(B)(2)(ii). It is also important to note that the CTA does not explicitly require the certification FinCEN seeks from federal agencies acting on behalf of foreign authorized users. See id. at § 1010.955(d)(ii)(B)(3)(ii). This is likely due to the fact that applicable federal agencies, not FinCEN, have subject matter expertise in determining whether a request has properly been made under an international treaty, agreement, convention, or other official request. See 31 U.S.C. § 5336(c)(2)(B)(ii). FinCEN might consider whether this certification is therefore inappropriate; however, FinCEN could also make clear that this certification is not meant to imply that FinCEN has any oversight authority regarding the applicable federal agencies making requests for disclosure and their related substantive law determinations.

[39] See Proposed Access Rule supra note 1 at 77422.

[40] See Proposed Access Rule supra note 1 at § 1010.955(d)(ii)(B)(2)(ii).

[41] See 31 U.S.C. § 5336(c)(6)-(7).

already be the subject matter jurisdiction of) the other competent authorities identified under the CTA.

B. FinCEN Should Clarify that Access to the BOI Directory will be Auditable and Technology-Enabled, not Reviewed on a Case-by-Case Basis

The final rule should clarify that the structure and nature of the access protocols in the CTA are meant to facilitate auditable and technologically-enabled access to the BOI directory, and that access will generally not be considered by FinCEN on a case-by-case basis.

1. Technology-Enabled Access is Required under the CTA, not Case-by-Case Review

Consistent with the nature of the protocols identified in 31 U.S.C. 5336(c)(2) and (3), access to the directory may be granted upon the determination by authorized users that they are engaged in an activity that qualifies. Pursuant to 5336(c)(3), Treasury is tasked, not with case-by-case review of these determinations, but with (i) approving standards and procedures for the respective agency regarding access to the directory, along with providing semi-annual certification regarding these standards and procedures; (ii) maintaining secure systems to store accessed BOI based on Treasury requirements; (iii) reporting the procedures established and utilized by the requesting agency to ensure the confidentiality of the BOI; (iv) in the case of only federal agencies engaged in national security, intelligence, or other law enforcement activities, certifying that access standards have been met and certifying the specific reason why the BOI is relevant to the investigation; (v) limiting the scope of access, *to the greatest extent practicable,* to the purpose consistent with accessing BOI; (vi) limiting access to certain internal authorized users; (vii) establishing and maintaining permanent and standardized records systems that are auditable that include details regarding the reason for the request; and (viii) conducting an annual internal audit regarding the accessed information and ensuring it is used in a manner consistent with the CTA and reporting the results of the audit to FinCEN.

In other words, authorized users, not Treasury or FinCEN, are to be responsible for each of the procedural tasks once the bounds of the task are set by FinCEN consistent with the CTA's requirements. Under the CTA, FinCEN is primarily tasked with defining procedural bounds that must be followed by authorized users; auditing–on an annual basis–adherence to the protocols established under the CT; and creating such other safeguards as may be necessary or appropriate to protect the confidentiality of the beneficial ownership.[42] FinCEN's role under the CTA is therefore in overseeing and promulgating procedural rules that are meant to ensure information is accessed for lawful purposes in a way that is auditable–not necessarily as every request is submitted to access the directory, but on semi-annual and annual basis.[43]

For substantive law and practical purposes, it makes sense that Congress defined FinCEN's role this way. Substantively, as discussed above, the CTA is not meant to confer any

[42] See 31 U.S.C. § 5336(c)(2) and (3).
[43] See id.

subject matter authority to FinCEN regarding the underlying legal matters meriting authorized access to the BOI directory.

Practically, FinCEN does not have the funding or related staffing necessary to act as gatekeeper with respect to each individual request for BOI access. As the proposed rule covers, the expectation is that there will be an extremely high volume of annual requests–millions annually.[44] FinCEN is not funded or staffed to substantively review each of these millions of requests,[45] and therefore it makes sense that Congress designed the CTA to rely on the requesting parties in large part to determine when access is appropriate and to create appropriate, auditable access governance systems. Failing to recognize this design would result in access bottlenecks that could severely undermine the effectiveness of the BOI directory–creating "red tape" to access that would undercut the purpose of the CTA.[46]

Instead, the CTA is specifically structured to allow technology-enabled access to the directory in a manner that allows authorized users to use the directory in a useful manner. As FinCEN correctly identifies, for authorized domestic government users (and for authorized federal agencies acting on behalf of foreign governments), the best read of the CTA is that access should permit authorized individuals within an authorized recipient agency to log in, run queries using multiple search fields and review one or more results returned immediately–all without necessarily involving iterative interaction or review by FinCEN personnel.[47] Additionally, to ensure the data is most useful and usable, authorized users should be able to perform searches by a wide range of fields including name of the beneficial owner, name of the person making a statement, identification number (e.g. driver's license number), home address, name of legal entity, business address of the legal entity, etc.[48]

The final rule should reflect this by clarifying that the BOI directory will be designed to allow this technology-enabled access and that FinCEN's role in facilitating and supervising directory access, including with respect to iterative investigatory processes, is limited to the specific oversight functions identified for FinCEN in the statute's text.

Similar clarification should also apply to financial institution access. The proposed rule remains somewhat vague on the role that FinCEN would play in approving each financial institution request for access and how this might factor into iterative or ongoing customer due diligence follow-up. FinCEN does create a higher standard in accessing the directory than is statutorily contemplated by requiring financial institutions to provide a form of compliance certification; however, FinCEN does helpfully contemplate a check-the-box option for this

[44] See, e.g., Proposed Access Rule supra note 1 at 77436 (estimating up to 2 million federal agency requests and 230,000 annual State, local, and Tribal requests).
[45] See, e.g., Proposed Access Rule supra note 1 at 77408 (identifying FinCEN's funding restraints).
[46] See Senator Sherrod Brown, supra note 17.
[47] Proposed Access Rule supra note 1 at 77409. References with respect to "justifying the reasons" for access in the proposed rule or the preamble to the proposed rule and similar concepts, which have no basis in the CTA, should be removed. See Proposed Access Rule supra note 1 at 77408.
[48] FinCEN and/or authorized agencies may also consider opting for a layered access approach, whereby the amount of information made available varies depending on a level of authorization (e.g., home address may be available to some individual users within an authorized agency and not others).

certification.[49] It should be made clear in the final rulemaking that financial institutions be allowed to access the directory in a technology-enabled manner, including for iterative inquiries, that does not entail case-by-case review by FinCEN, consistent with the requirement that the directory be highly useful to these users.[50] If this is not made clear, then the volume of requests could overwhelm FinCEN and prevent the directory from being useful at all.

2. The Use of Standardized Forms can Facilitate Appropriate Access under the CTA

Additionally, to facilitate technology-enabled access to the BOI directory, FinCEN should promulgate model web-based interfaces (or, forms) for comment governing the different types of access for authorized users and provide additional detail regarding the ways that authorized users can appropriately navigate the directory. These interfaces should allow identified statutory gatekeepers–such as State, local, and Tribal officers of the court, authorized federal agency and financial institution personnel, to access the directory based on procedures that do not involve review by individual FinCEN personnel. For example, access might be granted based on "check-the-box" certifications, such as are contemplated for financial institutions,[51] and utilizing secure credentials for identified personnel or court officers, as applicable.[52]

III. Data Best Practices and the CTA–Requiring Data Verification, Validation, and More

In the proposed rulemaking, FinCEN states that it is continuing to review the options available to verify BOI within the legal constraints of the CTA;[53] however, FinCEN fails to affirmatively state that it is required–on its own and working with other authorized users–to implement measures that ensure that information in the BOI directory is accurate, complete, and highly useful.[54] The final rule and implementation of the BOI directory should therefore clarify the various information verification mechanisms that FinCEN is required to ensure are employed under the CTA.

A. FinCEN is Required to Implement Verification Mechanisms

Under the CTA, FinCEN is required to "collect information in a form and manner that is reasonably designed to generate a database that is highly useful to national security, intelligence, and law enforcement agencies and Federal functional regulators."[55] It is not an exaggeration to say that the utility of the CTA and the BOI directory to national security, intelligence, and law enforcement agencies, as well as federal functional regulators, is

[49] See Proposed Access Rule supra note 1 at 77422.
[50] See 31 U.S.C. § 5336(b)(1)(F)(iv). Similar design and data considerations should be taken into account for financial institutions, with respect to the various beneficial owners identified by consenting reporting companies under the proposed rule. See supra note 47 and accompanying text.
[51] Supra note 49.
[52] Along with the models, FinCEN might also provide guidance on appropriate measures to support auditability of access, such as the automatic capturing of per record internal access logs (e.g., as metadata) that include information such as a time and date stamp, username, and IP address.
[53] See id.
[54] See 31 U.S.C. § 5336(d).
[55] P.L. 116-28 (116th Cong.), § 6402(8)(C).

predicated on the quality of BOI submitted and the data practices employed to ensure accuracy at and after the point of submission. It is also not surprising that Congress specifically required data best practices in enacting the CTA. Other beneficial ownership registries with less specific rules have faced challenges in ensuring data quality with respect to information such as whether an address is real, dates of birth for identified beneficial owners, and other potential data inconsistencies.[56]

Further, FinCEN is required under the CTA to coordinate with relevant Federal, State, and Tribal agencies, to (i) ensure that BOI collected under the CTA is "updated";[57] and (ii) to arrange for information to be provided to FinCEN, subject to applicable legal protections, as may be requested by FinCEN "for purposes of maintaining an accurate, complete, and highly useful database for beneficial ownership information."[58] In other words, it is not optional for FinCEN to implement data practices that contribute to verification, and the CTA allows for the design of a system of verification that makes use of mechanisms, such as cross-checking of information with other federal databases, that can significantly improve data quality.

B. Verification Requires Multiple Mechanisms

Importantly, the mechanisms necessary to ensure that information in the BOI database is accurate, complete, and highly useful include *all* of the following:

- ensuring those submitting information are identified and authorized to do so;
- ensuring the information submitted is validated, meaning it conforms to expected patterns (e.g., not being able to submit a date of birth in the future, or a non-existent zip code);
- ensuring the BOI itself is verified to be true, meaning both the identity of the beneficial owner and their status as beneficial owner, as explicitly required by the FATF;[59] and
- ensuring data that has already been submitted is frequently checked, for example using in-depth investigations of samples of data, and that information suspected of being incorrect is proactively identified and investigated.[60]

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[56] See Global Witness. "The Companies We Keep." July 2018 (emphasis added). https://www.globalwitness.org/en/campaigns/corruption-and-money-laundering/anonymous-company-owners/companies-we-keep/#chapter-6/section-0; Open Ownership, "Early Impacts of Public Registers of Beneficial Ownership: United Kingdom." April 2021: https://www.openownership.org/resources/early-impacts-of-public-registers-of-beneficial-ownership-united-kingdom/.

[57] Note that the final rule promulgated by FinCEN and the data best practices that are required under the CTA require ongoing data validation and verification (and as applicable data authentication and authorization). 31 U.S.C. § 5336(d).

[58] See id.

[59] See: Tymon Kiepe, "Verification of Beneficial Ownership Data (Policy Briefing)," Open Ownership (May 2020)

[60] The CTA specifically states as one of its purposes that the BOI database is meant to "bring the United States into compliance with international anti-money laundering and countering the financing of terrorism standards." P.L. 116-28 (116th Cong.), § 6402(5)(E). This includes implementing verification mechanisms for beneficial ownership reporting. See Financial Action Task Force, INTERNATIONAL STANDARDS ON COMBATING MONEY LAUNDERING AND THE FINANCING OF TERRORISM & PROLIFERATION: Recommendations 10, 24 (updated Mar. 2022), https://www.fatf-gafi.org/content/dam/recommandations/pdf/FATF%20Recommendations%202012.pdf.coredownload.inline.pdf.

FinCEN should clarify in the final rule and implement data best practices in the processes pursuant to which BOI is submitted, maintained, and used, to ensure that BOI is to be subject to checks in each of these three areas that assure it is of high quality– meaning it is accurate and complete at a given point in time. This includes ensuring that the information submitted to the register is at the very minimum plausible; appears in the correct format; is free from omissions; has been provided by a relevant, authorized person; and is free from error and falsehoods.

It should be noted that FACT has previously referred to "verification" of BOI in a way that incorporates each of these different mechanisms that can improve data accuracy, including data authentication and authorization, validation, and "truth" verification.[61] We have done so out of administrative convenience. In the proposed rulemaking, FinCEN has defined "verification" to mean "confirming that the reported BOI submitted to FinCEN is actually associated with a particular individual." This relates only to one component of verification, or what the Financial Action Task Force (FATF) refers to as verification of the "status" of the beneficial owner[62], and it is an important component of FinCEN's responsibilities under the CTA. However, this conceptual framing unduly narrows the scope of verification, and is only one way that FinCEN must meet their obligation to ensure data accuracy.

The considerations for promulgating a final rule and implementing a BOI directory that incorporates each means of verification may involve varying considerations that deviate from those involved solely in regulating to ensure verifying whether the statement made is true. For example, information regarding those submitting BOI and mechanisms to validate BOI do not involve the exchange of information that is protected information under the CTA. Although "beneficial ownership information reported" under the CTA is confidential, information regarding the persons authorized to report BOI and of beneficial owners that would be checked in connection with authentication and authorization is not BOI.[63] Nor does validation, much of which can be built into well-designed forms to collect information–which might involve ensuring that a submitted address is real, that a driver's license number exists and is matched to a particular individual, or that a person exists (and is not Mickey Mouse, for example)–require the disclosure of BOI as such.

Instead, the full range of mechanisms to ensure data accuracy (including authentication and authorization, as well as validation, can and should be addressed by FinCEN in a manner that improves CTA directory information quality without compromising any link of such information to a specified reporting company. Other BOI directories, such as the UK directory (the register of "people with significant control"), have begun to incorporate these requirements, and FinCEN should coordinate with applicable jurisdictions to ensure best practices.[64] Furthermore, this can be achieved through privacy-protected data sharing mechanisms such as

[61] See, e.g., RE: Beneficial Ownership Information Reporting Requirements Docket No.: FINCEN-2021-0005 and RIN 1506-AB49, FACT Coalition (Feb. 7, 2022), 1 & n. 119, https://thefactcoalition.org/wp-content/uploads/2022/02/FINCEN-2021-0005-0421_attachment_1.pdf [hereinafter, "FACT First Rule Comment"].
[62] See FATF, "The FATF Recommendations", Updated March 2022, https://www.fatf-gafi.org/content/dam/recommandations/pdf/FATF%20Recommendations%202012.pdf.coredownload.inline.pdf, p94
[63] 31 U.S.C. § 5336(c)(2).
[64] See Open Ownership, supra note 59.

a Zero-Knowledge Proof (ZKP) which compares information such as a driver's license number, name, and address, to see if they match, without requiring any of the parties to exchange or disclose them in any way or form.[65]

In contrast, verifying whether the statement made is true, which may necessarily involve confirming that reported BOI is actually associated with a particular individual, may require FinCEN to simultaneously ensure that such information remains subject to appropriate protections in light of the confidential nature of BOI under the CTA. To achieve this aim, FinCEN might consider implementing specific technological protections in connection with inter-agency truth verification mechanisms. These could include implementing verification that cross-checks information sets maintained by authorized users and the BOI directory using ZKPs through an automatable data exchange mechanism such as an application programming interface (API), which can ensure that individuals are not necessarily involved in the verification process unless, and until, an issue arises.

FinCEN is perfectly capable of satisfying its dual mandate to implement data best practices and maintain the confidentiality of BOI under the CTA–just as it is capable of working with authorized users to protect BOI in connection with directory access. The best read of the CTA requires that FinCEN promulgate final rules and implement processes to ensure that the BOI directory incorporates the full range of verification mechanisms necessary to ensure data accuracy, completeness, and utility for authorized users.[66]

IV. Clarify that access to the directory is also readily available to those agencies required to audit the directory under the CTA

The CTA requires a variety of audits to test its effectiveness, including with respect to the accuracy, completeness, and usefulness of registry information; actual use of registry directory; risks associated with, and any abuse of, existing statutory exemptions; and agency adherence to data access protocols.[67] Pursuant to these requirements, the CTA provides

[65] For example, see: Maxwell, N (2020) 'Innovation and discussion paper: Case studies of the use of privacy preserving analysis to tackle financial crime' Future of Financial Intelligence Sharing (FFIS) research programme. Version 1.3, p28.
[66] 31 U.S.C. § 5336(d).
[67] The law's mandatory audits include the following. 31 U.S.C. 5336(b)(6) requires Treasury to conduct an annual review, for three years after the registry becomes effective, on the effectiveness of the registry's procedures and standards related to minimizing reporting burdens and strengthening the accuracy of filed reports. 31 U.S.C. 5336(c)(10) requires GAO to conduct an annual audit, for seven years after the registry becomes effective, on agency adherence to the protocols established to control access to the registry and the extent to which Treasury "is using beneficial ownership information appropriately." 31 U.S.C. 5336(h)(4) requires the Treasury IG to establish a system to receive comments or complaints from third parties "regarding the beneficial ownership information notification and collection process or regarding the accuracy, completeness, or timeliness of such information." No time limit applies to that obligation. 31 U.S.C. 5336(i) requires Treasury to conduct a "[c]ontinuous [r]eview" of entities that are exempt from the registry's disclosure requirements and determine if any "entity or class of entities … has been involved in significant abuse relating to money laundering, the financing of terrorism, proliferation finance, serious tax fraud, or any other financial crime." CTA § 6502(a) requires GAO to conduct a study, two years after the registry has been in operation, "assessing the effectiveness of incorporation practices implemented" in response to the CTA and whether those practices have provided useful information to U.S. "national security, intelligence, and law enforcement agencies" and helped them combat "incorporation abuses" and "civil and criminal misconduct" and a range of financial crimes. CTA § 6502(b) requires Treasury to conduct a study to evaluate the "effectiveness of using FinCEN identifiers" and whether future registry disclosures should be limited to "company shareholders." CTA § 6502(c)

adequate authority for audit personnel to obtain and analyze relevant registry data. Yet, the proposed rulemaking is silent with respect to access for the purpose of these audits.

For example, while FinCEN has, consistent with the CTA's plain language, provided access to the directory for the Treasury Inspector General–one relevant auditor, in connection with its inspection efforts under the statute. However, FinCEN should also specifically mention, among other reasons for Treasury access, Treasury's related auditing and reporting functions, including with respect to section 6502(c) of the AML Act of 2020, or making a report regarding security of the BOI directory.[68]

As another example, the proposed rule ignores access for the Comptroller General of the United States within the Government Accountability Office.[69] As FACT has previously stated, it would be impossible for GAO to perform its auditing function without access to the directory.[70] GAO auditors would also be unable to conduct a detailed analysis of the CTA's exemptions, as required by CTA section 6502(c), if it were barred from examining what percentage of a particular State's new entities actually filed with the registry, what percentage failed to file, what entities filed exemption certificates with the registry, and any efforts by FinCEN, States, or others to deny exemptions and compel covered entities to file with the registry. As FinCEN recognized in its development of this proposed rule, the courts support interpretations of the law that avoid absurd results.[71] Denying registry auditors access to registry data would, in fact, be absurd. The final rule should specifically address access for these statutorily identified reasons.

V. Clarify that financial institution access to the directory is consistent with broader AML requirements imposed on financial institutions under the Bank Secrecy Act, including with respect to those persons that may access such information (Question 12)

In promulgating the final rule, FACT recommends that FinCEN clarify three key aspects regarding financial institution access consistent with the plain meaning and intent of the CTA: (1) that financial institutions should incorporate information accessed into their broader anti-money laundering and countering the financing of terrorism (AML/CFT), anti-fraud, and sanctions screening obligations; (2) that financial institutions may access the BOI directory in connection with any applicable customer due diligence requirements relating to their applicable AML/CFT, anti-fraud or sanctions screening obligations; and (3) that geographic boundaries are not used to limit access to authorized financial institution personnel.

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requires GAO, no later than two years after the registry's effective date, to review "the regulated status, related reporting requirements, quantity, and structure of each class of corporations, limited liability companies, and similar entities that have been explicitly excluded from the definition of reporting company" and assess the related "risks of money laundering, the financing of terrorism, proliferation finance, serious tax fraud, and other financial crime." CTA § 6502(d) requires GAO to conduct a study, no later than two years after the registry's effective date, to examine State law on "partnerships, trusts, or other legal entities," any lack of available beneficial ownership information, and what steps should be taken in response.

[68] Proposed Access Rule supra note 1 at § 1010.955(b)(5); see also 31 U.S.C. § 5336(i) (covering Treasury's review of exempt entities in connection with the report prepared in connection with section 6502(c) of the AML Act of 2020).

[69] 31 U.S.C. § 5336(c)(10).

[70] See FACT First Rule Comment supra note 61 at p. 91.

[71] See, e.g., supra note 7 and accompanying text.

A. Customer Due Diligence Requirements cannot be Separated from AML/CFT Obligations

In promulgating the final rule, FinCEN should clarify that financial institution access to the BOI directory is meant to facilitate compliance with customer due diligence requirements as a component of–and not isolated from–effective AML/CFT, anti-fraud, and sanctions screening requirements of the applicable financial institution, including under the Bank Secrecy Act (31 U.S.C. 5311 et seq.). The CTA grants financial institutions access to the BOI directory upon "a request made by a financial institution subject to customer due diligence requirements, with the consent of the reporting company, to facilitate the compliance of the financial institution with customer due diligence requirements under applicable law."[72] Notably, the CTA does not define "customer due diligence requirements under applicable law," and FinCEN has interpreted this to mean "FinCEN's customer due diligence (CDD) regulations at 31 CFR 1010.230, which require covered [financial institutions] to identify and verify beneficial owners of legal entity customers."[73]

Concerningly, FinCEN–potentially inadvertently–may limit use of BOI even further when it says the following in the preamble to the proposed rule:

"[FinCEN] considered interpreting the phrase 'customer due diligence requirements under applicable law' more broadly to cover a range of activities beyond compliance with legal obligations in FinCEN's regulations to identify and verify beneficial owners of legal entity customers. FinCEN's separate Customer Identification Program regulations, for example, could be considered customer due diligence requirements. FinCEN decided not to propose this broader approach, however."[74]

Specifically, a concern might be that FinCEN has indicated that BOI accessed under the CTA may *only* be used to identify and verify beneficial owners of legal entity customers based on "obligations" in FinCEN's regulations and that this information must essentially be walled off from other AML/CFT compliance efforts of the applicable financial institution. That interpretation, if not clarified, is in conflict with the plain language of the CTA and the clear intent of these reforms. That interpretation would also have the effect of amending the Bank Secrecy Act in a way that would undercut the effectiveness of risk-based AML/CFT protocols or sanctions enforcement and that is not explicitly contemplated by the statute, which would create an absurd result that cannot be supported by the CTA.

The plain language of the CTA and the AML Act of 2020 contemplates that financial institutions will incorporate information accessed by the BOI directory into their AML/CFT programs. In the preamble to the CTA, Congress made clear that BOI collected under the statute is meant to "confirm beneficial ownership information provided to financial institutions *to facilitate compliance of the financial institutions with anti-money laundering, countering the*

[72] See 31 U.S.C. § 5336(c)(2)(B)(iii).
[73] See Proposed Access Rule supra note 1 at 77415.
[74] See id.

financing of terrorism, and customer due diligence requirements under applicable law…."[75] Further, CTA required amendments to FinCEN's 2016 CDD rule[76] are to take into consideration that the BOI accessed via the directory is meant "to facilitate the compliance of those financial institutions with *anti-money laundering, countering the financing of terrorism, and customer due diligence requirements under applicable law*…."[77] This language makes clear that BOI accessed by financial institutions pursuant to appropriate protocols must be incorporated into the broader AML/CFT programs required of financial institutions.

As a point of clarification, the CTA states that access to the BOI directory may be granted to financial institutions upon a request "made by a financial institution subject to customer due diligence requirements, with the consent of the reporting company, to facilitate the compliance of the financial institutions with customer due diligence requirements under applicable law."[78] Theoretically, this language could be read to imply that financial institutions might only incorporate BOI accessed via the CTA in due diligence efforts. That reading, however, would ignore the previously cited, clear language that indicates that BOI is expected to be incorporated into AML/CFT programs.[79]

Similarly, information collected under the 2016 CDD rule does not presently exist in a vacuum–it informs the broader AML/CFT, anti-fraud and sanctions screening efforts of the financial institution, and the plain language of the CTA contemplates this fact. In fact, the CTA directly addresses amendments that are to be made to the 2016 CDD rule in light of financial institution access to the BOI directory.[80] These amendments expressly may not "repeal the requirement that financial institutions identify and verify beneficial owners of legal entity customers under section 1010.230(a) of title 31, Code of Federal Regulations." Section 1010.203(a) of title 31, Code of Federal Regulations requires financial institutions "to establish and maintain written procedures that are reasonably designed to identify and verify beneficial owners of legal entity customers *and to include such procedures in their anti-money laundering compliance program required under 31 U.S.C. 5318(h) and its implementing regulations."*[81] *These rules also require banks to incorporate this customer due diligence into, among other efforts, their sanctions screening obligations.*[82] Therefore, the best reasonable read of the CTA based on the plain language of the statute is that "customer due diligence requirements" is meant to describe the instance pursuant to which financial institutions will access BOI in the directory–in connection with fulfilling customer due diligence requirements as part of, and not separate from, broader AML/CFT, sanctions screening, and CTR programs.

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[75] See P.L. 116-283 (116th Cong), § 6402(6)(B) (emphasis added).
[76] 81 Fed. Reg. 29397 (May 11, 2016).
[77] See P.L. 116-283 (116th Cong), § 6403(d)(1)(B) (emphasis added).
[78] 31 U.S.C. 5336(c)(2)(B)(iii).
[79] See supra notes 75 and 77.
[80] See P.L. 116-283 (116th Cong), § 6403(d)(1)(B).
[81] 31 C.F.R. 1010.230(a) (emphasis added).
[82] See 81 Fed. Reg. 29398 ("Financial institutions should use beneficial ownership information as they use other information they gather regarding customers (e.g., through compliance with CIP requirements), including for compliance with the Office of Foreign Assets Control (OFAC) regulations, and the currency transaction reporting (CTR) aggregation requirements.").

It would also be plainly against the intent of the CTA if BOI accessed through the CTA directory were not incorporated into financial institution AML/CFT or sanctions screening programs. The CTA clearly states that its purpose is to, among other things, protect vital United States national security interests, and protect interstate and foreign commerce.[83] In doing so, the CTA is meant to assist in stopping malign actors from engaging in illicit financial activity, including money laundering and the proliferation of financing of terrorism.[84] It would run entirely counter to the purpose of the CTA if financial institutions are to close their eyes and plug their ears regarding BOI accessed for customer due diligence purposes in otherwise carrying out their AML/CFT or sanctions screening obligations.

Moreover, isolating the use of information obtained by any financial institution in connection with its customer due diligence obligations from AML/CFT, sanctions screening or similar obligations would mischaracterize–or, even effectively amend–the primary "applicable law" pursuant to which customer due diligence obligations exist. The 2016 CDD rules are promulgated pursuant to the requirement that financial institutions implement effective AML/CFT programs under 31 U.S.C. 5318.[85] The 2016 CDD rules do not exist in isolation; they exist as a component of and inherently as a part of carrying out an effective AML/CFT program, and this is reflected in the 2016 CDD rules.[86] Again, there is no legal requirement to perform customer due diligence obligations that is not also an obligation to use customer due diligence information in carrying out effective AML/CFT programs.

Reading the CTA otherwise would effectively amend other provisions of the BSA, including section 5318(h), as well as the 2016 CDD rule, in a way that is not contemplated in the CTA. Section 5318(h) of the Bank Secrecy Act requires that financial institutions create risk-based AML/CFT programs.[87] There is no indication in section 5318(h) that financial institutions must or may ignore information that they are privy to in carrying out these AML/CFT programs.[88] A similar result is reached when considering sanctions screening or similar efforts. Congress would not have accidentally significantly amended the Bank Secrecy Amendment to undermine effective AML/CFT programs and sanctions screening processes at the same time as trying to buoy AML/CFT and sanctions screening efforts across the economy in passing the CTA.

The final regulations should avoid absurd results.[89] An interpretation of the statute that runs contrary to the plain language and purposes of CTA, while effectively undermining or amending the Bank Secrecy Act more broadly, would be an absurd result. Therefore, the final

[83] See P.L. 116-283 (116th Cong), § 6402(5).
[84] See P.L. 116-283 (116th Cong), § 6402(3)-(4).
[85] See 81 Fed. Reg. 29398 ("FinCEN has the legal authority for this action in the Bank Secrecy Act (BSA), which authorizes FinCEN to impose AML program requirements on all financial institutions 1 and to require financial institutions to maintain procedures to ensure compliance with the BSA and its implementing regulations or to guard against money laundering.") (citing 31 U.S.C. 5318(h)(2) for authority).
[86] See id.
[87] 31 U.S.C. 5318(h).
[88] To the contrary, AML/CFT programs are supposed to be reasonably designed to assure and monitor compliance. 31 U.S.C. 5318(h)(2)(B)(iv)(I).
[89] Supra note 60 and accompanying text.

regulations should clarify that financial institutions should incorporate accessed BOI into their broader AML/CFT programs, sanctions screening obligations and similar efforts.

B. Congress Meant all Applicable Customer Due Diligence Requirements

FinCEN also limits financial institution access to the BOI directory by clarifying in the proposed rule that the only customer due diligence requirements that merit access are those resulting from the 2016 CDD rule. There is no basis for this limitation under the statute, and therefore FACT recommends removing this limitation in the final rule.

As discussed, in enacting the CTA, Congress did not specifically define either the phrase "customer due diligence requirements" or "applicable law." Yet, Congress does specifically require FinCEN to amend the 2016 CDD rule in the CTA, which may indicate that the customer due diligence requirements being referred to are only those included in the 2016 CDD rule. However, if that is the case, then the question remains why Congress would specifically refer to the 2016 CDD rule in discussing which customer due diligence requirements must be amended, and not in referring to which customer due diligence requirements provide the incidence for financial institution access under the CTA?[90]

As FinCEN acknowledges, there are various customer due diligence requirements that may apply to financial institutions under the Bank Secrecy Act, or otherwise.[91] For example, in addition to the 2016 CDD rule (and pursuant to it), banks engage in customer due diligence to ensure sanctions compliance.[92] Congress was clear that the purpose of the CTA is to tackle the abuse of anonymous entities, including their use in sanctions evasion, financial fraud, and myriad other illicit activity.[93] Each of these customer due diligence requirements is promulgated pursuant to "applicable law" in that each of them advance the AML/CFT requirements or anti-sanctions evasions efforts placed on financial institutions consistent with the overall efforts of the CTA. Congress demonstrates in the CTA that it knows how to explicitly identify particular customer due diligence requirements, and it did not do so in defining when financial institutions may access the BOI directory. Therefore, the best read of the CTA is that financial institutions may access the CTA directory in advancing any of their applicable customer due diligence requirements in connection with AML/CFT obligations, and principally those under the BSA.

C. Appropriate Financial Institution Personnel Should Not include Geographic Limitations (Question 23)

Finally, FinCEN should consider revising the geographic limitations it imposes on the financial institution personnel or contractors that may access BOI, as these limitations may be inconsistent with how financial institution compliance departments are structured. The proposed rule limits access of BOI to financial institution personnel and contractors that are located within the United States.[94] No such limitation exists under the plain language of the CTA. Instead, the

[90] Compare 31 U.S.C. 5336(c)(2)(B)(iii), with P.L. 116-283 (116th Cong), § 6403(d)(1).
[91] See Proposed Access Rule supra note 1 at 77415.
[92] See 31 U.S.C. 5318(h)(2)(B)(iv)(I).
[93] Public Law 116-283 (116th Cong.), § 6402.
[94] See Proposed Access Rule supra § 1010.955(d)(2)(i).

CTA relies on procedural protections relating to personnel training and technology infrastructure. Moreover, FinCEN does not give any specific reason for this restriction, and it is likely to interfere with the staffing and compliance efforts and many financial institutions in a way that seems inconsistent with the aims of the CTA. Therefore, FinCEN should consider removing this limitation in the final rule.

VI. Provide Clarification Regarding Certain Components of Foreign Authority Access to the Directory that are Inconsistent with the Plain Text of the CTA

The proposed rule generally closely adheres to the CTA's provisions granting access to foreign authorized users through a requesting federal agency. However, FinCEN should consider providing clarification regarding the training and authentication protocols necessary for foreign access and the definition of trusted countries so that these rules promote consistent access that also best furthers U.S. national security, intelligence and law enforcement efforts.

A. Foreign Access - Consistent Training and Authentication Mechanisms

To further U.S. national security, intelligence, and law enforcement efforts consistent with the intent of the CTA, FinCEN should clarify that the training and authentication mechanisms required for foreign access use are consistent with domestic authorized users. Partner jurisdictions accessing the BOI directory are required to implement consistent training and technology infrastructure protocols under the CTA and consistent with the instruments pursuant to which access is granted.[95] Maintaining the consistency of these parameters also furthers U.S. national security, intelligence, and law enforcement efforts as foreign jurisdiction access may directly advance U.S. concerns or promote better information-sharing reciprocity among our partners.

The proposed rule limits any BOI access strictly to foreign persons that have undergone training on the appropriate handling and safeguarding of such BOI.[96] This is inconsistent with, and more strict than, the standard applied to domestic users, recognizing that some individuals involved in national security, intelligence, and law enforcement activities will not be the individuals directly involved in the handling and safeguarding of BOI.[97] This may result in a scenario in which a foreign investigator authorized to use the database is then prohibited from sharing beneficial ownership information further with relevant members of their investigative team, undermining the ability to use the information in said investigation. However, FinCEN does not give any particular reasoning why foreign investigatory teams may be treated differently and why intermediary U.S. regulators that may handle and safeguard the BOI are not capable of protecting BOI. Instead, it seems that FinCEN's concern is that if there is an intermediary U.S. agency involved, then FinCEN may not be directly involved in handling and safeguarding the information–including in training relevant personnel. But, FinCEN is already

[95] See 31 U.S.C. § 5336(c)(2)(B)(ii).
[96] See Proposed Access Rule supra § 1010.955(d)(3)(i)(D)(3).
[97] Cf. Proposed Access Rule supra note 1 at § 1010.955(d)(1)(i)(F)(3).

training intermediary agencies on these points. Accordingly, FinCEN should revise the final rule to read more consistently with the U.S. agency access requirements.[98]

The proposed rule also declines to create a process whereby intermediary federal agencies can "authenticate" BOI for foreign users. Instead, the proposed rule indicates that FinCEN "may establish" a process allowing the intermediary federal agency to provide them or may instead use an arrangement in which FinCEN will act as an additional intermediary.[99] The proposed rule offers no justification for requiring FinCEN to make authentication decisions on an agency-by-agency basis. A better approach would be to give all federal agencies transmitting documents to foreign countries the authority to authenticate those documents. This approach would also recognize practical realities regarding FinCEN's limited ability to engage in these requests on a case-by-case basis.

Making these clarifications regarding training and authentication will make the directory more useful to our partners and, in turn, make the directory more useful to advancing U.S. national security, intelligence, and law enforcement aims. Already, the proposed rule recognizes the importance of this reciprocity when it employs the best read of the CTA to interpret the phrase "law enforcement investigation or prosecution" – which the CTA uses to describe covered activities by foreign requesters – as essentially equivalent to the phrase "law enforcement activity" describing covered activities by State, local, and Tribal agencies.[100] Enabling our partner jurisdictions to better engage in national security, intelligence and law enforcement activities may directly advance U.S. national security efforts if foreign partners[101] are pursuing similar bad guys, and it can also help ensure more reciprocal information exchange for the U.S. in our own efforts to stop abuse of U.S. markets.

In contrast, the proposed rule's training requirement far exceeds what our foreign partners require from U.S. agencies requesting BOI from foreign registries. That runs contrary to the plain language of the CTA and could ultimately undermine the aims of the CTA. Therefore, FACT recommends that Treasury clarify the rules relating to training and authentication for foreign users in the final rule.

B. Foreign Access - Trusted Countries (Question 10)

While FinCEN takes a sensible approach under the proposed rule regarding the CTA's "trusted foreign country" requirement, FinCEN may consider providing certain additional guidance in the final rule consistent with the statutory text. Under the CTA, Congress limited foreign access occurring outside of a treaty, agreement or convention, to official requests made

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[98] This can be achieved by revising proposed rule section 1010.955(d)(3)(i)(D)(3) to limit foreign access to users: "who have undergone training on the appropriate handling and safeguarding of information obtained pursuant to this section *or have obtained the information requested directly from persons who both received such training and received the information directly from FinCEN or the appropriate federal agency pursuant to this (d)(3)."*

[99] See Proposed Access Rule supra note 1 at 77415.

[100] FACT recommends that FinCEN not change this approach in promulgating the final rule. See Proposed Access Rule supra § 1010.955(b)(3). For this reason, FinCEN's approach regarding MOUs and audit practices also employ the best read of the CTA, which cannot be reasonably read to limit U.S. engagement with foreign partners in efforts to bring about stronger global AML/CFT frameworks. See Proposed Access Rule supra note 1 at 77414.

[101] This information exchange can be limited to "trusted countries" after all.

by "trusted foreign countries."[102] Congress did not, however, define the phrase trusted foreign countries.

Under the proposed rule FinCEN will address foreign access requests occurring outside of a treaty, agreement or convention "on a case-by-case basis or pursuant to alternative arrangements with intermediary Federal agencies" that have "ongoing relationships with the foreign requester."[103] FinCEN sensibly declines to develop an exclusive list of "trusted" foreign countries, as that list would potentially be limiting, including based on changing circumstances, in a way that is inconsistent with the national security, intelligence and law enforcement aims of the statute. However, FinCEN might consider giving advance notice of those countries that are explicitly not trusted countries. Working with the State and relevant Treasury officials, among other key federal agencies, FinCEN might be able to identify such a list. Doing so would be consistent with the CTA's reliance on treaties, agreements and conventions–and the intermediary federal agencies that oversee these relationships–to determine when access may be appropriate. It may also alleviate certain administrative burdens for federal agencies when an inquiry is plainly not from a trusted country.

VII. Provide Clarification Regarding the Incidence of Certain Access Protocols

In the final rule, FinCEN might consider clarifying that certain access protocols, including those occurring pursuant to sections 5336(c)(2)(C)(iii) and 5336(c)(3)(B)-(D), (H), and (I) and similar, do not necessarily apply on an iterative basis with respect to each information request, but rather may apply across collective information requests. As an example, consider the various agreements and technology systems that federal regulators, financial institutions, and requesting agencies may need to implement in order to gain BOI directory access. While these protocols may apply with respect to each instance of BOI directory access, it would be entirely impractical for the Department of Justice, for example, to enter into a new agreement with FinCEN regarding CTA access protocols for each instance of BO directory access.

Perhaps FinCEN did not provide this clarity because it is so obviously the case that any other application of these protocols would be administratively unfeasible and completely undermine the purpose and use of the BOI directory under the CTA. However, it may presently be ambiguous under the proposed rule what levels of protocol activity are required with respect to each applicable request for access. FinCEN should clarify that certain requirements apply as it relates to participating in information access generally, which the BOI directory may confirm automatically or which may be limited to certain periods (such as with respect to auditing requirements) and not, necessarily, in connection with each information request. 6 and

VIII. Clarify the Potential Scope of Disclosure Associated with Authorized Disclosure in the case of Civil and Criminal Proceedings and State, Local and Tribal Access (Question 16 and 19)

[102] See 31 U.S.C. § 5336(c)(2)(B)(ii).
[103] See Proposed Access Rule supra note 1 at § 1010.955(b)(3)(ii)(B).

The proposed rule contemplates the authorized disclosure of information in connection with civil and criminal proceedings involving Federal, State, local, and Tribal laws to a court of competent jurisdiction or parties to the proceeding.[104] To the extent that additional disclosure is procedurally related to this disclosure, FinCEN should clarify that this form of disclosure is not barred by the statute or the final rule. For example, BOI would not be barred from being accessed because it might result in a public court decision, among other reasons. To imply otherwise would clearly be in conflict with the purposes of the CTA to aid in national security, intelligence, and law enforcement efforts, as well as to discourage abusive financial practices involving anonymous entities that are currently pervasive in the United States economy. Although this point may seem obvious, it is an important clarification to ensure that authorized courts, relevant agencies and federal regulators do not avoid accessing the BOI directory based on procedural realities associated with investigations.

Additionally, it is possible that state regulatory agencies may qualify as a relevant "State, local, or Tribal law enforcement agency" for purposes of the CTA, and the final rule should make clear that authorized CTA disclosure would not be limited accordingly. Among other examples, a state securities regulator might be involved in activities consistent with preventing securities fraud or a state bank regulator may have and enforce its own customer identification requirements. FinCEN should clarify in the final rule that these agencies are relevant "State, local, or Tribal" law enforcement agencies based on this question.

IX. Additional Comments

A. "National Security, Intelligence, or Law Enforcement" Definition (Question 6)

The proposed rule takes a reasonable approach in defining "national security, intelligence, or law enforcement activities," and this comment makes three recommendations that would make the final rule as consistent as possible with the intent of the CTA. First, this comment recommends that FinCEN explicitly clarify the ways that myriad illicit activities furthered through anonymous entities may compromise national security, including by enabling corruption. Second, this comment recommends that FinCEN clarify that the guidance regarding intelligence activities is not intended to limit the scope of the CTA. Finally, this comment recommends that the final rule explicitly incorporates the analysis from FinCEN clarifying that federal functional regulators may be engaged in law enforcement efforts or similar efforts meant to, among other applicable aims, deter illicit activity.

The CTA explicitly contemplates the ways that a myriad of activities may, in fact, present national security concerns. Congress stated:

> "malign actors seek to conceal their ownership of corporations, limited liability companies, or other similar entities in the United States to facilitate illicit activity, including money laundering, the financing of terrorism, proliferation financing, serious tax fraud, human and drug trafficking, counterfeiting, piracy, securities fraud, financial fraud,

[104] See § 1010.955(c)(2)(vi).

and acts of foreign corruption, *harming the national security interests* of the United States and allies of the United States."[105]

In making this observation, Congress made clear that preserving the safety and security of the United States includes addressing all manners of illicit activity, including those activities that compromise the integrity of our markets, tax systems, human rights systems, and that furthers global corruption. The FACT Coalition recommends that the final rule clarify that the proposed definition of national security activity is not meant to limit the Congressional determination that threats to our national security include myriad harms that ultimately do threaten the safety and security of the United States.

Additionally, FACT recommends that FinCEN clarify that the definition of intelligence activity relied upon is not meant to restrict the nature of activities pursuant to which the BOI directory may be accessed as it relates to "United States Persons," as defined in Executive Order 12333.[106] Although Executive Order 12333 includes an appropriate definition of various intelligence activities, it may be that Executive Order 12333 includes certain limiting language as to the scope of inquiry regarding United States persons that is not consistent with, or that otherwise is specifically addressed by the CTA. It should be made clear that these limitations are not meant to prevent any authorized users, including authorized foreign users that are also engaged in intelligence activities, from accessing the BOI directory as explicitly contemplated under the CTA.

Finally, the preamble to the proposed rule makes an important clarification that certain federal regulators that may be involved with regulating financial institutions will also be engaged in law enforcement activities that will require access to the BOI directory.[107] This is consistent with the plain language of the CTA, which explicitly identifies that securities fraud, and financial fraud may undermine national security, and it is also consistent with AML/CFT activities that are carried out by the U.S. Securities and Exchange Commission, for example (among others).[108] FACT recommends that the final rule explicitly make this clarification in section 1010.955(b)(1)(iii), as the clarification around "Federal regulatory agency" access may be read to ignore this important point.

In passing the CTA, Congress made clear that the abuse of anonymous entities is pervasive and exists to perpetuate myriad harms to the interest of the United States and our allies.[109] Accordingly, it would be inappropriate for FinCEN to narrow the definition of "national security, intelligence, or law enforcement" activities in a way that may jeopardize the ability of the CTA to effectively aid in the prevention of any of these harms, and FinCEN's definitions of these terms generally faithfully implements this language. FinCEN's approach to defining these

[105] Public Law 116-283 (116th Cong.), § 6402.
[106] Executive Order 12333, United States Intelligence Activities, https://dpcld.defense.gov/Portals/49/Documents/Civil/eo-12333-2008.pdf. .
[107] See Proposed Access Rule supra note 1 at 77412.
[108] Public Law 116-283 (116th Cong.), § 6402.
[109] Public Law 116-283 (116th Cong.), § 6402.

critical terms generally takes a reasonable approach that, by incorporating these three recommendations, would clarify the best read of the CTA.

B. **Partner Jurisdiction Information Systems** (Question 22)

FinCEN employs the best read of the CTA when it clarifies that Federal, State, local, and Tribal agencies may rely on existing databases and related IT infrastructure to satisfy the requirement to 'establish and maintain' secure systems in which to store BOI, applying these standards on a "case-by-case" basis. FinCEN might clarify in the final rule that this includes existing databases and related IT infrastructure that are updated to meet CTA requirements. FinCEN might also clarify that FinCEN will coordinate with agencies to develop technology-enabled access that will maximize the utility of access and minimize additional development costs for these agencies.

The CTA requires that requesting agencies "establish and maintain" a secure system to store BOI.[110] However, most agencies that will access the CTA already have certain databases or related IT infrastructure that is meant to securely store personal information, in one form or another. It would be unnecessary and overly burdensome for each agency that may access the directory to create whole cloth new secure systems to store BOI, making FinCEN's interpretation the best read of the CTA.[111] Where agencies have existing systems or can leverage systems of other related authorities (such as for allowing States, localities and Tribes to pool resources or collaborate with other agencies) that may be modified to conform with the CTA, FinCEN should also clarify that these systems may satisfy CTA requirements when modifications create appropriate security and confidentiality programs. Finally, there are ways that the BOI directory may be designed to minimize the burden on other agencies–such as by allowing authorized users to store information regarding specific investigations in the centralized directory. FinCEN should explore these methods in an effort to ensure that the directory is accessible by resource-constrained partners–such as State and local authorities–that are clearly meant to be able to access the BOI directory under the CTA.

C. **Reporting Company Consent for Financial Institution Access** (Question 11)

FinCEN adopts the best read of the CTA by relying on reporting companies to provide consent to financial institutions for financial institution access to the BOI directory, as well as by tasking financial institutions with record-keeping functions relating to this consent (rather than FinCEN). However, FinCEN should clarify in the final rule that reporting company consent is needed only once and not in connection with each query the financial institution may need to make in connection with its customer due diligence requirements.

FinCEN is right to identify that, in order for the BOI directory to be highly useful to financial institutions in fulfilling their customer due diligence requirements, it is imperative that the directory be administrable. Financial institutions deal directly with their reporting company prospective and current clients, not FinCEN. However, financial institutions typically do not

[110] 31 U.S.C. §5336(c)(3)(C).
[111] See Proposed Access Rule supra note 1 at 77420.

directly interface with all beneficial owners (partially explaining the need for entity customer due diligence requirements). It is therefore the case that reporting companies are best positioned to give consent for financial institutions to access the BOI directory directly to the relevant financial institution in connection with routine onboarding efforts or in connection with the CTA's implementation (for existing account holders). FinCEN is also correct when it writes that it is not expected to have "capacity to review, verify, and store consent forms and additional FinCEN involvement would create undue delays for the ability of FIs to onboard customers."[112] It therefore is the best read of the CTA that financial institutions maintain reporting company consent records; not FinCEN.

For the same administrative reasons, FinCEN should clarify that reporting company consent is not needed in connection with each instance of financial institution access. Financial institutions are required under relevant AML/CFT and sanctions screening program obligations to maintain their customer due diligence requirements. As FinCEN has clearly identified, one core element of any financial institution's customer due diligence requirements includes, "ongoing monitoring for reporting suspicious transactions and, on a risk-basis, maintaining and updating customer information."[113] It would be administratively unfeasible for financial institutions to seek reporting company authorization in connection with iterative customer due diligence requirements under applicable law, and this would undermine the utility of the CTA directory in conflict with the CTA's intent. Therefore, FACT recommends that the final rule clarify that reporting company consent is only required once (unless and until revoked, upon which time it would need to be given again).

D. **BOI Redisclosure** (Question 18)

Overall, FinCEN employs the best read of the CTA in clarifying that redisclosure of BOI need not be approved on a case-by-case basis in connection with: (i) redisclosure by authorized State, local and Tribal authorities to a court of competent jurisdiction or parties to a civil or criminal proceeding; (ii) redisclosure to the Department of Justice for federal agencies for referral purposes; and (iii) redisclosure by international partners that access BOI information under applicable treaties, conventions or other agreements.[114] The redisclosure contemplated by FinCEN in these cases relates directly to the investigations pursuant to which BOI is accessed in the first place. Requiring FinCEN approval to advance the investigations clearly contemplated by the CTA would create administrative hurdles that might make the CTA completely useless to authorized users, in conflict with the stated purpose of CTA.[115] Therefore, it is the best read of the CTA that case-by-case approval for redisclosure of BOI is not needed in the circumstances identified by FinCEN.

This comment suggests that FinCEN consider clarifying that approval for redisclosure is not needed in any case that involves joint investigations among authorized users. It is unclear under the proposed rule the extent to which authorized agencies engaged in joint investigations

[112] See id. at 77422.
[113] See 81 Fed. Reg. 29398 (May 11, 2016).
[114] See Proposed Access Rule supra note 1 § at 1010.955(c)(2)(vi)-(viii).
[115] Public Law 116-283 (116th Cong.), § 6402.

may utilize BOI to further investigations. It would be an unreasonable read of the CTA if authorized users engaged in joint investigations (including across jurisdictions) were prevented from advancing efforts to crack down on illicit activities by requiring case-by-case approval from FinCEN any time BOI information may be pertinent to an investigation. FinCEN might consider clarifying this point in final regulations, as it indicates it is currently being considered in the preamble to the proposed regulations.[116]

E. Treasury Access

The proposed rule appropriately provides access to the Department of Treasury in a manner that is explicitly required by the plain language of the CTA and FinCEN should maintain this access in the final rule.[117] Pursuant to the CTA, Treasury and the IRS are to explicitly have immediate, direct, and full access to the directory to carry out their duties relating to national security, intelligence, civil and criminal law enforcement, and financial regulation, among other official duties, as well as for tax administration.[118] FinCEN was correct to rely on the Congressional definition for tax administration defined in the Internal Revenue Code, and any limitation of this definition would have no basis in the CTA.

F. **FinCEN Intermediary Identifiers** (Question 30)

FinCEN correctly identifies in the proposed rule the potential risks presented by the use of intermediary FinCEN identifiers, and the proposal FinCEN makes to address this risk provides a best reasonable interpretation of the CTA. As FACT previously detailed, it is necessary to provide additional clarification regarding the circumstances pursuant to which a reporting company may use entity-related FinCEN identifiers (or intermediary identifiers) to prevent reporting companies from using complicated ownership structures and intermediary identifiers to file incomplete or misleading BOI reports. Pursuant to the CTA:[119]

> "If an individual is or may be a beneficial owner of a reporting company *by an interest* held by the individual in an entity that, directly or indirectly, holds an interest in the reporting company, and *if such intermediary entity has obtained a FinCEN identifier* and provided the entity's FinCEN identifier to the reporting company, then the reporting company may include such entity's FinCEN identifier in its report in lieu of the information required under paragraph (b)(1) of this section with respect to such individual." (Emphasis added.)

As FACT previously demonstrated using multiple illustrative examples, it is necessary for FinCEN to provide further clarification regarding the phrases "by an interest" and "if such intermediary entity has obtained a FinCEN identifier" in the above CTA section in order to prevent reporting companies from manipulating these phrases to file incomplete or misleading

[116] See Proposed Access Rule supra note 1 at 77419.
[117] The one clarification that might be made to Treasury access has to do with Inspector General Access. See supra note 66 and accompanying text.
[118] 31 U.S.C. § 5336(c)(5).
[119] 31 U.S.C. § 5336(b)(3)(C).

reports.[120] Simply put, the need for this clarification is due to the fact that (i) any given beneficial owner may hold its interest in the reporting company, directly or indirectly, through many different intermediary entities, and (ii) any given intermediary entity may or may not have necessarily identified the relevant beneficial owner in obtaining a FinCEN intermediary identifier.[121]

As an interpretation that would explicitly allow for incomplete or misleading disclosure would be an absurd result under the CTA, FACT recommended that FinCEN clarify this ambiguity by requiring chain-of-ownership reporting capable of accurately identifying each beneficial owner and all intermediary entities through which such beneficial owner owns its interest in the reporting company. FACT also recommended that all reporting companies be required to file initial reports that identify beneficial owners by name or individual FinCEN identifier. These solutions would have addressed the ambiguity in full.

In the proposed rule, however, FinCEN has taken a different approach. FinCEN has clarified the ambiguity by clarifying that intermediary FinCEN identifiers may only be relied upon when "the beneficial owners of the [other] entity and of the reporting company are the same individuals."[122] FACT believes that this proposal helps to resolve the ambiguities previously identified in a manner that avoids absurd results, contributes to an accurate and complete directory, and will ensure that the CTA is highly useful in combating illicit activity conducted through anonymous entities.

To completely remove ambiguities and ensure that the BOI directory is accurate and complete, FinCEN should consider promulgating the final regulations and implementing directory systems in a way that guarantees authorized users will be able to identify the chain of ownership through which a particular beneficial owner indirectly owns its interest in the relevant reporting company. The directory itself could be designed with a function that allows authorized users to map ownership, for example. To the extent this would require any additional reporting by the reporting company, it would be consistent with the clear intent for the directory to be highly useful to authorized users.[123] It should also not be burdensome for reporting companies, which are best positioned to ensure accurate reporting is available consistent with the plain intent of the CTA.[124]

Additionally, FACT would propose FinCEN make the following clarifications in the final rule to avoid any further ambiguity and to ensure the CTA is faithfully implemented:

§ 1010.380 Reports of beneficial ownership information

(b) * * *

[120] See FACT First Rule Comment supra note 61 at 20-24.
[121] See id.
[122] See Proposed Access Rule supra note 1 at § 1010.380(b)(4)(ii)(B)(3).
[123] See Public Law 116-283 (116th Cong.), § 6402.
[124] See 31 U.S.C. §5336(b)(4).

(4) * * *

(ii) * * *

(B) A reporting company may report another entity's FinCEN identifier and full legal name in lieu of the information required under paragraph (b)(1) of this section with respect to a beneficial owner or the beneficial owners of the reporting company only if:

(1) The other entity has obtained a FinCEN identifier accurately and completely identifying the beneficial owner or beneficial owners and provided that FinCEN identifier to the reporting company;

(2) ~~An~~ The individual is ~~or may be~~ a beneficial owner, or the individuals are beneficial owners, of the reporting company by virtue of an interest in the reporting company that the individual or individuals holds through the other entity; and

(3) The beneficial owners of the other entity and of the reporting company are at all times the same individuals.

G. Question 8 and Question 15

FACT would direct FinCEN to the response to public comment from Citizens for Responsibility and Ethics in Washington (CREW) regarding FinCEN's Question 8 (foreign authority access) and 15 (relating to SRO access).

X. Proposed BOI Reporting Form

Finally, this comment letter urges that Treasury expediently withdraw and reissue the proposed BOI intake forms released by FinCEN on January 17, 2023.[125] While FACT will separately submit comments on the proposed intake form by March 20, 2023 in line with the public solicitation for such comments, FACT urges Treasury to reverse course on the unprecedented reporting optionality FinCEN proposes offering under the CTA.

The Proposed BOI Intake Form allows reporting companies to report "unknown" with respect to each relevant detail regarding a given beneficial owner's identity–including whether the company is even able to identify its beneficial owners in the first place.[126] **Allowing reporting companies to simply declare that they do not know information required under the CTA has no basis in the law and conflicts with the CTA's plain meaning.** It is not an exaggeration to say that the Proposed BOI Intake Form effectively makes the CTA an optional reporting regime. Congress did not give FinCEN the authority to declare the CTA as an optional

[125] See BOI Intake Form supra note 5.
[126] See id. The Proposed BOI Intake Form also allows a similar level of voluntary reporting regarding applicants in a way that has no tie to the final first rule implementing the CTA and that also has no basis under the CTA. See id.

law. That is an absurd result that FinCEN must avoid in promulgating any final BOI intake form.[127]

The Proposed BOI Intake Form is also inconsistent with a wide variety of other federal third-party information reporting and similar regimes regarding AML/CFT programs, securities regulation, tax enforcement, employment eligibility regulation and more.[128] Failing to require this information would undercut the purpose of the law and federal information reporting regimes, generally. In the interest of time, FACT urges the Treasury to withdraw the proposed BOI intake forms and expediently reissue them without the option to declare as "unknown" required identifying information regarding beneficial owners and applicants under the CTA.

Conclusion

We thank you, again, for the opportunity to comment on this second proposed rule to implement the CTA primarily governing access to the BOI directory. While the first final rule implementing the CTA created a strong foundation for implementing the CTA, FACT urges Treasury to consider and incorporate the comments in this letter to faithfully implement the law. The establishment of a beneficial ownership registry represents the most significant upgrade to U.S. anti-money laundering safeguards in a generation — it is critical that FinCEN seize this opportunity to implement the CTA in the most effective manner.

Should you have any questions, please feel free to contact Erica Hanichak at ehanichak@thefactcoalition.org.

Sincerely,

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[127] See, e.g., Griffin supra note 7 and accompanying text.
[128] See, e.g., Form IRS Form 5472 (Information Return of a 25% Foreign-Owned U.S. Corporation or a Foreign Corporation Engaged in a U.S. Trade or Business), https://www.irs.gov/forms-pubs/about-form-5472; 31 C.F.R § 1020.220 (requiring financial institutions to close bank accounts and file SARs when they cannot verify beneficial ownership information regarding an account).